with a civil action, and that this inconsistency exists quite as much in the case of a wrong not criminally punishable. *Brown* v. *Swineford* (1878) 44 Wis. 282. If by the giving of exemplary damages in the former case the defendant is twice punished by the public where he should be punished but once, in the latter case he is once punished where he should not be punished at all. A recent Kentucky case, awarding exemplary damages regardless of previous criminal proceedings, *Doerhofer* v. *Shewmaker* (1906) 97 S. W. 7, illustrates the true solution of the difficulty by a repudiation of the "deterrent" theory itself. The principle there laid down, that though "vindictive damages operate by way of punishment, they are allowed as compensation for the injury complained of * * * because the injury has been increased by the manner in which it was inflicted" makes such damages thoroughly at one with theories of private recovery, and obviates the fear of double punishment which has led other courts into inconsistency.

It is believed that this position of the Kentucky court is well within the earlier cases. That originally exemplary damages were not awarded as a deterrent to others, is plain. In the manorial courts damages were awarded specifically for the disgrace attaching to one whose rights had been infringed; 2 P. & M., Hist. of Eng. L. 536; and while in the King's Court damages for shame were not awarded as such, yet in practice this element was not neglected; 2 P. & M. Hist. of Eng. L. 536, n. 5 and 6. The jury were chancellors to determine the amount of damages from the equities of the case, *Hixt* v. *Goats* (1613) 2 Rol. Abs. 703 pl. 15, and exemplary damages were given without interference from the court. *Lord Townsend* v. *Hughes* (1677) 2 Mod. 150. But the growing consciousness that damages were to be assessed by some rule, *Ash* v. *Ash* (1695) Comb. 357, forced the courts to assign reasons when upholding large verdicts rendered under the jury's ancient prerogative, which were obviously just. *Huckle* v. *Money* (1763) 2 Wils. 205. In the case last cited exemplary damages were sustained on the ground that in a most flagrant, high-handed manner, one of the fundamental rights of a citizen had been invaded. It is apparent that damages over and above actual loss were given for the violent infringement of the right, just as nominal damages are given where a right has been infringed and no damage suffered. *Ashby* v. *White* (1706), Salk. 19; *Seneca Road* v. *Railroad* (N. Y. 1843) 5 Hill. 170, 175. Damages paid for the infringement of a right as such are, of course, a punishment from the standpoint of the offender, and, as they operate to deter others from committing like offences, *Merest* v. *Harvey* (1813) 5 Taunt. 442, this has, by a confusion of ideas, come to be regarded as one of the purposes of exemplary damages. *Coryell* v. *Colbaugh* (N. J. 1791) Coxe 77. But the best considered modern cases recognize that these damages are given as compensation by way of atonement for the infringement of the private right. *Fry* v. *Bennett* (N. Y. 1855) 4 Duer 247, opinion of HOFFMAN, J.; *Chiles* v. *Drake* (Ky. 1859) 2 Metc. 146.

QUASI-CONTRACTUAL ACTIONS AFTER RESCISSION OF CONTRACT.—Rescission is a term constantly encountered in the law of contracts in confusingly diverse connections. Cf. Harriman, Contracts §§ 397, 400; Bishop, Contracts §§ 809 et seq. It is used, in the first place, to desig-

nate the right of a person to avoid a contract because of fraud or mistake. *Roth* v. *Palmer* (1858) 27 Barb. 652. By such "rescission" the contract is avoided in its entirety and *ab initio*, *Thurston* v. *Blanchard*, Mass. (1839) 22 Pick. 18, from which it follows that no right of action for previous breach is possible. On the other hand it is apparent that previous part performance is left without compensation. *Connor* v. *Henderson* (1818) 15 Mass. 319; *Brown* v. *Wither* (1848) 10 Ohio 142. The term is applied, in the second place, to the mutual release which takes place by agreement of the parties. *Wheeden* v. *Fiske* (1870) 50 N. H. 125; *Wheeler* v. *New Br. Ry. Co.* (1884) 115 U. S. 29, 34. Since the ordinary "rescission" of this sort is intended to cover only the mutual contract obligations, rights of action for previous breaches continue, unless otherwise agreed. 6 COLUMBIA LAW REVIEW 359. But it cannot be said that prior part performance is left uncompensated, since the agreement of rescission is presumed to have been made with reference to such matters. *Collyer* v. *Moulton* (1868) 9 R. I. 90. Rescission is used, in the third place, in cases of breach sufficiently vital to discharge the other party from further performance, to express the injured party's election not to perform. *Cox* v. *McLaughlin* (1880) 54 Cal. 605. Here, of course, the original contract is not destroyed at all. *U. S.* v. *Behan* (1884) 110 U. S. 338. All existing rights, therefore, both as to previous breaches and for part performance survive to the innocent party. *Hale* v. *Trout* (1868) 35 Cal. 229. In all three classes the result of the thing done is to release one or both parties from certain obligations, the release differing in extent in each class. But there is a further difference in the underlying ground of the release in each case. In the first class it is a right raised by the law itself; in the second, it is founded upon a new contract made by the parties; in the third, it arises merely from the enforcement of the conditions of the original agreement.

In a recent case in Oregon where the defendant failed to deliver goods at the time specified in the contract, it was held that the defendant had "wrongfully rescinded" and that the plaintiff might recover a part of the purchase money already paid in quasi-contract. *Williams Hanley Co.* v. *Comles* (1906) 87 Pac. 143. This raises the question of quasi-contractual rights growing out of contract, which seems to be somewhat clarified by the foregoing classification. Since, in the second class, rights in respect of partial performance are settled in the contract of rescission, nothing remains upon which to base a quasi-contractual action. In the first class, on the other hand, if the injured party has made partial payment or given part performance, it would seem proper for the law to imply an obligation to compensate him. The contract being avoided *ab initio* the quasi-contract action is clearly to be allowed on the theory of waiver of tort, wherever the defendant has been guilty of fraud, or has refused a demand for or exercised acts of ownership over goods delivered. *Roth* v. *Palmer*, supra. And in any case, recovery should be given on general theories of unjust enrichment, the defendant having received something for which he has given no compensation and which it is his duty to make good.

This reasoning, however, does not apply to the third class, in which the principal case falls. The injured party's election in this class is not

to annul the contract, but to consider further performance on his part unnecessary because the other party has not done that upon which such performance was conditioned. All rights which accrued before breach remain in full force and full remedy may be had by the injured party in a contract action. The question in this class, then, is whether the party may waive his contract action for one in quasi. Unquestionably the quasi-contractual action is borrowed from the Roman Law, Pothier on Obligations, Vol. II, 328, where in connection with express contracts it was allowed only where there was a mistake in the inception of the contract, or an immoral or illegal contract, or where there was performance on one side only of a contract of exchange, Ledlie's Sohm's Institutes 423–427, the theory governing the last case being that the promise alone of the defendant was no consideration and that the latter was, therefore, enriched without giving anything in return. Ledlie's Sohm's Institutes 391. The rapid extension of the field of this action in the common law is probably accounted for by the fact that in the competition between law and equity it proved a most valuable instrument for applying equitable remedies under legal guise. Kerly's History of Equity 86; 2 Harv. Law Rev. 66, 69. There was no reason for the law to give a quasi-contractual action where the remedy at law was adequate, which was admittedly the case where an express contract existed. The argument that the quasi-contractual action is more just is seriously questioned. Without abandoning the theory of contracts entirely, it is hard to see how the law can say that as between the parties the contract it implies is more just than the one they make for themselves.

THE POSITION OF AN INNOCENT PURCHASER IN EQUITY.—When one has an equity charged upon an estate he may have his equitable rights enforced against a purchaser who takes legal title with notice of the existing charge upon the estate. But in the case of a purchaser for value without such notice there is another party who has been defrauded and whose conscience is clear; and between these two conflicting equities the fact that one is coupled with legal title is decisive. *Townsend* v. *Little* (1883) 109 U. S. 504, 511. Though this rule arose from a consideration of both elements, *Boone* v. *Chiles* (1836) 10 Pet. 177, 210; *German etc. Soc.* v. *De Lashmutt* (1895) 67 Fed. 399, the earlier cases were prone to ascribe as a reason for refusing to act in such cases either the sole fact that equity had no call on the conscience of the defendant, *Jerrard* v. *Saunders* (1794) 2 Ves. Jr. 457, or the sole fact that equity should protect a legal title. *Bassett* v. *Nosworthy* (1673) Finch 102. By giving undue preference to the latter element some courts seem to have reached the conclusion that this defense cannot operate in favor of the purchaser of a mere equitable title since there is not the necessity of protecting a legal title and a prior equity must be considered superior to a later one. *Briscoe* v. *Ashby* (Va. 1874) 24 Grat. 454. In reason, however, the rule in such cases should be a logical counterpart of the rule with regard to purchasers at law, cf. *Colyer* v. *Finch* (1856) 5 H. L. C. 905, 920; *Town of St. Johnsbury* v. *Merrill* (1882) 55 Vt. 165, viz., that the claims of both parties should be weighed in each case, and that the point of priority in time should govern only in cases where the equities are otherwise equal. *Rice* v. *Rice* (1853)